state, consistently with the Equal Protection Clause, enact discriminatory, content-based regulations such as those at issue here. In the view of the amici, the federal constitutional claims have been correctly addressed by the Court of Appeals and the judgment of that Court should be affirmed.

The kind of regulations at issue here, moreover, are not thought to be constitutionally required or sound educational policy in many public institutions of higher education. The University of Delaware, for example, allows the student commons to be used regularly for religious worship. *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976); but see *Dittman v. Western Washington University*, ____ F. Supp. ____ (W.D. Wash. 1980) app. pending, 9th Cir. The University of Iowa has for decades had a distinguished department of religious studies, and similar programs are now in operation in the majority of the state college and university systems. Moreover, the study of the Bible as literature is clearly permissible. *Calvary Bible Presbyterian Ch. v. Bd. of Regents*, 72 Wash. 2d 912, 436 P.2d 189 (1967); see also *Schempp, supra*, at 225, and at 300 (Brennan, J., concurring), and at 306 (Goldberg, J., concurring).

On the occasion of the centennial celebration of religious activities on the campus of the University of Michigan, the eminent constitutional scholar Paul Kauper observed that if the First Amendment required that state universities refrain from doing anything to accommodate the religious interests of students and faculty members on public campuses, "it becomes extraordinarily remarkable to what extent our state universities for almost a century have engaged in unconstitutional practices. Or perhaps the more sensible conclusion can be drawn that these practices have given us a practical interpretation, founded on public approval and an understanding of the university function, which is more vital and authoritative than logical con-

clusions drawn from abstract propositions." P. Kauper, in *Legal and Other Critical Issues of Religion in Public Higher Education* 20 (1958). Three years later Professor Kauper wrote: "If the government without dictating or coercing belief on any one's part recognizes the place of religion in the life of the community, and, without preferring one or more religious groups, accommodates its program and the use of its facilities to religious needs and supports activities in which the government and the churches have a concurrent interest and common concern, religious freedom is not placed in jeopardy. On the contrary, it may be argued that the government is thereby contributing to religious freedom and making it more meaningful. Some situations may arise when a choice must even be made between the non-establishment principle as broadly conceived and the principle that the government may not discriminate on religious grounds." Kauper, "Church and State: Cooperative Separation," 60 *Mich. L. Rev.* 1, 6 (1961).

Most recently, the Association for the Coordination of University Religious Affairs (ACURA) at its annual meeting in Washington, D.C., in March of 1981 authorized the preparation of a statement of Standards for Religious Programs. These proposed standards urge that "All colleges and universities, public or private, which profess interest in the development of the whole student, obligate themselves to provide directly or indirectly for spiritual and religious development of students."[6]

This cursory review of the practices of public universities and of standards proposed for religious programs in all American institutions of higher education, whether public or private,

---

[6]The proposed Standards have been published in *Dialogue on Campus*, vol. XVI, no. 3 (Spring 1981) pp. 3-6, and are available to the parties in this litigation and to the Librarian of the Supreme Court upon request to the Center for Constitutional Studies.

suggests that the posture adopted by the petitioner in the instant case reflects not an attitude of benevolent neutrality, but of official hostility to religion that is not warranted by the First Amendment and that is contrary to its historical intent and subsequent interpretation.

II. UNLESS THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED, FEDERAL REGULATION OF CHURCH-RELATED HIGHER EDUCATION MAY, IN IMPORTANT RESPECTS, REMAIN EXCESSIVELY RESTRICTIVE AND BURDENSOME.

The Center for Constitutional Studies focuses much of its efforts on legal issues affecting church-related higher education, and in so doing the staff of this Center has come to acquire considerable experience with the interpretations by various federal officials of this Court's decisions concerning the religion clauses of the First Amendment.[7] Like the judgment of the District Court in this case, these administrative judgments often go far beyond the holdings of this Court, and the amici are in a position to suggest to this Court the impact that the decision of this Court in this case could have on religiously affiliated higher education.

Many of the church-related colleges and universities that form the broad ecumenical constituency of concern of the Center for Constitutional Studies have, for example, received federal financial institutional assistance in the form of grants or loans authorized in the Higher Education Facilities Act of 1963,

---

[7]See e.g., P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education (1979); and E. Gaffney and P. Moots, The Government and the Campus: Federal Regulation of Religously Affiliated Higher Education* (1981).

Pub. L. 88-204, 77 Stat. 363, sustained by this Court in *Tilton v. Richardson,* 403 U.S. 672 (1971). This federal statute prohibits the use of any building constructed in part or in whole with such federal subsidies for "sectarian instruction or as a place for religious worship." 20 U.S.C. §1132(e)-1(B)(iii). Because of this statutory provision, the Department of Education requires all institutions that have ever participated in this program to certify on a regular basis that they do not allow federally funded facilities to be used in an impermissible way. 45 C.F.R. §100a et seq. and §170.

As part of a study of the impact of federal regulation on religiously affiliated colleges and universities, the Center for Constitutional Studies conducted an extensive survey of the chief administrators of these institutions in 1978.[8] One of the results of this study is that the college administrators participating in the study rarely complained that federal regulation in and of itself impeded these institutions from carrying out their religious mission or purpose. A notable exception to this finding was the frequent complaint that strained interpretations concerning the use of federally funded facilities for any sort of religious purpose (e.g., sacred music courses) constituted governmental interference. This study disclosed several instances of administrative hostility toward religion on church-related campuses.

One of the reasons why churches in this country have engaged for centuries in an educational mission is to stress that

---

[8]The results of this study are to be published by the University of Notre Dame Press in 1981 under the title *The Government and the Campus: Federal Regulation of Religiously Affiliated Higher Education.* The page proofs of this study are available to the Librarian of the Supreme Court, and to the parties in this litigation, upon request to the Center for Constitutional Studies.

religious studies form an integral part of a liberal education.[9] Amici maintain that college students are to be encouraged to pursue such studies and to observe the practices connected with their voluntarily embraced religious commitments, whether on public campuses or private campuses. This Court's decision will undoubtedly affect the administrative process governing the regulation of the use of federally funded facilities at church-related colleges. By affirming the judgment of the Court of Appeals, this Court can assist federal officials charged with implementation of the *Tilton* guidelines to understand not only what the First Amendment forbids, but also what it allows. In this way, the Court can alleviate the impact of the federal regulations most frequently identified by administrators at religiously affiliated colleges as an excessively burdensome interference with the religious mission and purpose of these institutions.

III. BY AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS, THIS COURT CAN CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER.

In his opinion for this Court in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980)

---

[9]See, e.g., J. Mosely, ed., *Church and College: A Vital Partnership* 4 vols. (1980); B. Fisher, ed. *New Pathways: A Dialogue in Christian Higher Education* (1980); J. Westerhoff, ed., *The Church's Ministry in Higher Education* (1978); R. Parsonage, ed., *Church Related Higher Education: Perceptions and Perspectives* (1978); E. Carlson, *The Future of Church-Related Higher Education* (1977); R. Baepler and A. Olsen, eds., *The Church-Related College in an Age of Pluralism: The Quest for a Viable Saga* (1977); National Commission on United Methodist Higher Education, *A College-Related Church: United Methodist Perspectives* (1976) and *Endangered Service: Independent Colleges, Public Policy and the First Amendment* (1976); and J. Newman, *The Idea of a University* (Image Book ed. 1959).

Justice White wrote that "Establishment Clause cases are not easy; they stir deep feelings. . . ." *id.* at 662. This Court's decisions in *Engel v. Vitale,* 370 U.S. 421 (1962) and in *Abington School District v. Schempp,* 374 U.S. 203 (1963) have surely been among the cases that have stirred "deep feelings" in the Republic. The impact of these decisions on the American political process has been studied extensively.[10] Much of the initial furor over these two cases was based on a failure to read those decisions carefully, if at all.[11] This case offers this Court the opportunity to clarify its teaching adumbrated in *Engel* and *Schempp* concerning the permissibility of genuinely voluntary prayer.

The opinion of the District Court in the instant case is an example of the damage that can be done to valuable constitutional rights if those charged with applying *Engel* and *Schempp* to a variety of factual patterns stray too far beyond the holdings

---

[10]See, e.g. Beaney and Beiser, "Prayer and Politics: The Impact of *Engel* and *Schempp* on the Political Process" 13 J. of Pub. L. 475 (1964) reprinted in T. Becker, ed. *The Impact of Supreme Court Decisions* 20-34 (1969). For other examples of impact studies relating to the *Engel* and *Schempp* decision, see Katz, "Patterns of Compliance with the *Schempp* Decision," 14 J. Pub. L. 396 (1963); Birkby, "The Supreme Court and the Bible: Tennessee Reactions to the *Schempp* Decision" 10 Midwest J. of Pol. Sci. 304 (Aug. 1966); R. Johnson, *The Dynamics of Complaince: Supreme Court Decision-Making From a New Perspective* (1967); Reich, "The Impact of Judicial Decision-Making: The School Prayer Cases," in D. Everson, ed., *The Supreme Court as Policy Maker: Three Studies on the Impact of Judicial Decisions* 44-81 (1968); W. Muir, *Prayer in the Public Schools: Law and Attitude Change* (1967); and K. Dolbeare and P. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (1971).

[11]For an account of the congressional reaction, see Beaney and Beiser, note 10 *supra.* And see 125 Cong. Rec. S 4128-4131 (daily ed., Apr. 5, 1979) (purporting to limit Supreme Court jurisdiction over cases involving "voluntary prayer"), and S 4138-4152 (daily ed., Apr. 9, 1979) (same).

of those cases. This is not to suggest that this Court should reverse the decisions announced in those cases. For in affirming the judgment of the Court of Appeals, this Court need not retreat from its holding in *Engel* that the states should refrain from composing prayers for public recitation in the public schools, or from its ruling in *Schempp* that the states should eschew even subtle forms of coerced participation in devotional exercises.

Many constitutional scholars have construed the real significance of this Court's ruling in *Zorach v. Clauson,* 343 U.S. 306 (1952) and *McCollum v. Bd. of Education,* 333 U.S. 203 (1948) as a unified prohibition of employing "the *force* of the public school . . . to promote [religious] instruction." *Zorach, supra* at 315 (emphasis added). See Toms and Whitehead, "The Religious Student In Public Education: Resolving a Constitutional Dilemma," 27 Emory L. J. 3 (1978), and literature cited therein. There is no evidence of a "captive audience" in the case at bar. Professor Laurence Tribe suggests that the gist of the offense in *McCollum* was "the combination of material, organizational, and, above all, *symbolic* support for religious instruction," *American Constitutional Law* 825 (1978). No such support was sought by the respondents in this case. Ardent opponents of school prayer amendments have testified before congressional committees that the crux of the issue is that the State cannot *promote* or *establish* the reading of the Bible or the recitation of prayers. For example, in April of 1964 the well known constitutional scholar, Dr. Leo Pfeffer testified as follows:

> There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools. . . . All it says is that the State through its agencies cannot promote or establish

the reading of the Bible or recitation of prayers.

Hearings on School Prayer before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee 89th Cong., 2d Sess. 188 (1966). In the 1966 Senate hearings Dr. Pfeffer stated:

> Nothing in any decision of the Supreme Court forbids an individual schoolchild voluntarily to offer a prayer before or after taking of food or perhaps on other occasions, so long as the regular discipline of the school and other children is not thereby disturbed or interfered with.

Id. at 345-346. For similar statements, see *id.* at 215 (statement of Baptist Joint Committee on Public Affairs), at 263 (statement of Department of Social Responsibility, Unitarian Universalist Association), and at 307 (statement of Methodist Bishop Richard Raines). Since the record in the instant case discloses that the activity that the respondents sought to engage in need not be *sponsored* or financially supported by the university administration, any more than it sponsors or put its official stamp of approval on other student organizations allowed to meet on campus, *Healy v. James, supra, Gay Lib v. University of Missouri, supra,* this case presents an opportunity for this Court to clarify that *truly* voluntary prayer is constitutionally permissible.

CONCLUSION

For the reasons stated above, amici urge that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

Of Counsel:

KENNETH F. RIPPLE
Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2786

Attorney for Amici Curiae:

EDWARD McGLYNN GAFFNEY, JR.
Associate Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(219) 283-2786

CERTIFICATE OF SERVICE

State of Indiana)
) ss.:
St. Joseph County)

On this _____ day of May, 1981, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Brief of the Center for Constitutional Studies of the University of Notre Dame Law School, the National Council of Churches of Christ in the U.S.A., the National Institute of Campus Ministry, and United Ministries in Education as Amici Curiae in Support of the Respondents to the following attorneys:

Ted D. Ayres, Esq.
Counsel, University of Missouri
227 University Hall
Columbia, MO 65211
Counsel for Petitioners

James M. Smart, Esq.
Smart and Whitehead
1006 Grand Avenue
Kansas City, MO 64106
Counsel for Respondents

EDWARD McGLYNN GAFFNEY, JR.

Sworn to and Subscribed before me
the day and year aforesaid.

Rosemary K. Reiter, Notary Public

MOTION FILED
JUN 3 1981

NO. 80-689

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

GARY E. WIDMAR, et al.,

Petitioners

vs.

CLARK VINCENT, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, AMICUS CURIAE.

Barry A. Fisher, Counsel of Record
Larry J. Roberts
David Grosz
Fisher & Moest
Two Century Plaza, Suite 3160
2049 Century Park East
Los Angeles, California 90067
(213) 557-1077

Attorneys for Holy Spirit Association for the Unification of World Christianity, Amicus Curiae

NO. 80-689

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARY E. WIDMAR, et al.,

Petitioners

vs.

CLARK VINCENT, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, AMICUS CURIAE.

Barry A. Fisher, Counsel of Record
Larry J. Roberts
David Grosz
Fisher & Moest
Two Century Plaza, Suite 3160
2049 Century Park East
Los Angeles, California 90067
(213) 557-1077

Attorneys for Holy Spirit Association for the Unification of World Christianity, Amicus Curiae

NO. 80-689

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARY E. WIDMAR, et al.,

Petitioners

vs.

CLARK VINCENT, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Holy Spirit Association for the Unification of World Christianity (hereinafter, "Unification Church" or "Church") hereby respectfully moves, pursuant to Sup. Ct. R. 36, for leave to file the accompanying brief Amicus Curiae in this appeal. The motion is based on the following grounds:

A. Interest of the Unification Church.

1. The Unification Church is a California non-profit religious corporation, holding, inter alia, federal, California, and Illinois tax exemptions. The Unification Church was founded in 1954 and is now established in hundreds of cities throughout the United States and the world. The Church teaches fundamental religious beliefs and emphasizes prayer, evangelical missionary engagements, religious rallies, workshops, retreats, and lectures. An important part of the Church's activities in furtherance of its beliefs consists of public-place proselytizing of its tenets and principles, frequently accompanied by the solicitation

of funds from the public for support of the Church.

2. In the latter connection, the Church and its members deal on a continuing basis with state and local laws and other rules regulating public solicitation of funds. On numerous occasions, the Church or its members have been obliged to engage in litigation concerning many aspects of the validity of these enactments, */ and they expect that such litigation will

---

*/ Reported cases dealing with such challenges by the Unification Church or its members include, e.g., Westfall v. Board of Comm'rs, 477 F. Supp. 862 (N.D. Ga. 1979); Walker v. Wegner, 477 F. Supp. 648 (D.S.D. 1979); Erskine v. West Palm Beach, 473 F. Supp. 48 (S.D. Fla. 1979); Weissman v. City of Alamogordo, 472 F. Supp. 425 (D.N.M. 1979); Holy Spirit Ass'n for the Unification of World Christianity v. Alley, 460 F. Supp. 346 (N.D. Tex. 1978); Cherris v. Amundson, 460 F. Supp. 326 (E.D. La. 1978); Smith v. City of Manchester, 460 F. Supp. 30 (E.D. Tenn. 1978); Hall v. McNamara, 456 F. Supp. 245 (N.D. Cal. 1978); Swearson v. Meyers, 455 F. Supp. 88 (D. Kan. 1978); Love v. Mayor of Cheyenne, 448 F. Supp. 128 (D. Wyo. 1978); Levers v. City of Tullahoma, 446 F. Supp. 844 (E.D. Tenn. 1978); Evans v. Fullard, 444 F. Supp. 1334 (W.D. Pa. 1978).

(footnote cont.)

similarly be necessary in the future. In consequence, the Church has a continuing interest in the development of the law in this area.

3. The Church seeks to engage in the activities described above in public places of many descriptions, including public college campuses and similar loci. If the novel views expressed by the petitioner in this case are held to constitute an accurate statement of the law, the Church and its members may be precluded by the establishment clause from engaging in their activities in places previously thought to be public fora in which conduct protected by the free speech and free exercise of religion clauses could not constitutionally be prohibited.

---

*/ (continued)

See also, e.g., Heritage Village Church and Missionary Fellowship, Inc. v. State, 263 S.E. 2d 726 (N.C. 1980)(Unification Church an intervenor in action challenging state statute).

4. In particular, an organization affiliated with the Unification Church, the Collegiate Association for the Research of Principles [CARP] is situated similarly to the Cornerstone group and its members. The Church and CARP share many common members. Like Cornerstone, CARP is an organization of college students who seek to perform religious activities. CARP was founded in 1964 and is now in existence at more than 100 colleges and has more than 5,000 dedicated student members. CARP is dedicated to the propagation among students of the religious principles espoused by the Unification Church. The on-campus activities of CARP involve programs of religious content, which programs are sought to be carried out in many college campuses, both in exterior and interior areas thereof. If the petitioner's petition is permitted to stand, there would be an obvious and very substantial adverse effect on CARP and its members

and activities. Given the close association of CARP and the Unification Church, the latter is well situated to act to protect the interests of the former.

B. Reasons Why the Brief Amicus Curiae is Desirable.

5. As set forth above, the Unification Church is highly experienced in first amendment litigation involving the use of public fora. The Church participated on many occasions in actions involving questions similar to those of this case and has sought to contribute to the development of the law in this field. The Church's perspective on the theory of the public forum is a distinctive one, and it believes that the discussion contained in its Brief Amicus Curiae will be helpful to this Court by contributing to the presentation of a more complete view of the constitutional issues involved.

WHEREFORE, movant respectfully requests that it be granted leave to file

its Brief Amicus Curiae in this appeal.[1]

Dated: 29 May 1981

Respectfully submitted,

Barry A. Fisher, Counsel
of Record
Larry J. Roberts
David Grosz
Fisher & Moest
Two Century Plaza
Suite 3160
2049 Century Park East
Los Angeles, CA 90067
(213) 557-1077

Attorneys for Holy Spirit
Association for the
Unification of World
Christianity, Amicus Curiae

[1] Consent of the respondents to file this brief was obtained. However, consent of the petitioner was not obtained.

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Summary of Argument	1
ARGUMENT	
I. INTRODUCTION	1a
II. RECOGNIZED PRINCIPLES OF FREEDOM OF EXPRESSION REQUIRE THAT RELIGIOUS EXPRESSION BE PERMITTED IN A PUBLIC FORUM ON THE SAME BASIS AS ALL OTHER EXPRESSION.	4
III. SIMPLE RELIGIOUS EXPRESSION UPON STATE PROPERTY DOES NOT CONSTITUTE AN ESTABLISHMENT OF RELIGION.	18
IV. COMPLIANCE WITH STATE CONSTITUTIONAL MANDATES CANNOT JUSTIFY CONTRAVENTION OF THE FEDERAL FIRST AMENDMENT.	44
V. CONCLUSION	48

TABLE OF AUTHORITIES

Cases	Page
A Quaker Action Group v. Morton 516 F.2d 717 (D.C. Cir. 1975)	39
Cantwell v. Connecticut 310 U.S. 296 (1940)	40
Carey v. Brown 100 S. Ct. 2286 (1980)	11
Chess v. Widmar 635 F.2d 1310 (8th Cir. 1980) cert. granted, 101 S. Ct. 1345 (U.S. 1981)	31,34,37
Danskin v. San Diego Unified School District 28 Cal. 2d 536, 171 P.2d 885 (1946)	30
Epperson v. Arkansas 393 U.S. 97 (1968)	18
Erznoznik v. City of Jacksonville 422 U.S. 205 (1975)	12
Everson v. Board of Education 330 U.S. 1 (1947)	35
First National Bank v. Bellotti 435 U.S. 765 (1978)	17
Fowler v. Rhode Island 345 U.S. 67 (1953)	5,8
Grayned v. City of Rockford 408 U.S. 104 (1972)	14,15
Healy v. James 405 U.S. 169 (1972)	2,14

Page

Hudgens v. NLRB 12
424 U.S. 507 (1976)

International Society for
Krishna Consciousness v. Eaves 9
601 F.2d 809 (5th Cir. 1979)

International Society for
Krishna Consciousness v.
Engelhardt 9
425 F. Supp. 176
(W.D. Mo. 1977)

International Society for
Krishna Consciousness v. Griffin 8
437 F. Supp. 666 (W.D. Pa. 1977)

International Society for
Krishna Consciousness v. Lentini 9
461 F. Supp. 49 (E.D. La. 1978)

International Society for Krishna
Consciousness v. New York Port
Authority 9
425 F. Supp. 681 (S.D.N.Y. 1977)

International Society for Krishna
Consciousness v. Rochford 8
585 F.2d 263 (7th Cir. 1978)

International Society for Krishna
Consciousness v. Wolke 8
453 F. Supp. 869 (E.D. Wis. 1978)

Jaffe v. Alexis 24,42
No. C-79-1229 ACW
(N.D. Cal. Aug. 13, 1979)

Jeanette Rankin Brigade v.
Chief of Capitol Police 39
342 F. Supp. 575 (D.D.C.)
aff'd, 409 U.S. 972 (1972)

	Page
Keegan v. University of Delaware 349 A.2d 14 (Del.), rev'g on other grounds, 318 A.2d 135 (Del. Ch. 1974) cert. denied, 424 U.S. 934 (1975)	21
Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board 578 F.2d 1122 (5th Cir. 1978)	29,37
Kunz v. New York 340 U.S. 290 (1951)	2,7,34
Kusper v. Pontikes 414 U.S. 51 (1973)	39
Lemon v. Kurtzman (Lemon I) 403 U.S. 602 (1971)	31
Lovell v. City of Griffin 303 U.S. 444 (1938)	2
McDaniel v. Paty 435 U.S. 618 (1978)	3,45,49
National Socialist White People's Party v. Ringers 473 F.2d 1010 (4th Cir. 1973)	30
Niemotko v. Maryland 340 U.S. 268 (1951)	6,16
O'Hair v. Andrus 613 F.2d 931 (D.C. Cir. 1979)	24,34,37, 38
Police Department v. Mosely 408 U.S. 92 (1972)	4,11
Poulos v. New Hampshire 345 U.S. 395 (1953)	7

Page

Pratt v. Arizona Board of Regents
110 Ariz. 466,
520 P.2d 514 (1974) 22

Pruneyard Shopping Center v. Robins
100 S. Ct. 2035 (1980) 42

Reitman v. Mulkey
387 U.S. 369 (1967)
aff'g 64 Cal.2d 529,
413 P.2d 825,
50 Cal. Rptr. 881 (1967) 45

Saia v. New York
334 U.S. 558 (1948) 6,34

Schneider v. New Jersey
308 U.S. 147 (1939) 40,41

Tilton v. Richardson
403 U.S. 672 (1971) 32

Tinker v. Des Moines Independent Community School District
393 U.S. 503 (1969) 14

Torcaso v. Watkins
367 U.S. 488 (1961) 45

Tucker v. Texas
326 U.S. 517 (1946) 6

United States v. Boesewetter
463 F. Supp. 370 (D.D.C. 1978) 8

United States v. Silberman
464 F. Supp. 866 (M.D. Fla. 1979) 39

Village of Schaumburg v. Citizens For a Better Environment
444 U.S. 620 (1980) 41

Page

Walz v. Tax Commission
397 U.S. 664 (1970) 19,32,47

Wolin v. Port of New York
Authority
392 F.2d 83 (2d Cir.),
cert. denied, 393 U.S. 940
(1968) 14,15

Wright v. Chief of Transit Police
558 F.2d 67 (2d Cir. 1977) 38

Zorach v. Clauson
343 U.S. 306 (1952) 47

Other Primary Authorities

U.S. Const. art. VI, cl. 2 44

H.R. Res. 1, 44th Cong.,
1st Sess., 4 Cong. Rec. 5190
(1876) 46

Cal. Const. art. IV, §8 27

Mo. Const. art. I, §§ 6-7 44,46

Mo. Const. art. IX, § 8 44,46

Wash. Const. art. I, § 11 46

Wash. Const. art. IX, § 4 46

[1977] Wash. Op. Atty Gen. No. 11 47

Page

Secondary Authorities

Cass, First Amendment Access to Government Facilities, 65 Va. L. Rev. 1287 (1979) — 16

Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1 — 4,5

Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975) — 5

L. Pfeffer, God, Caesar and the Constitution (1975) — 46

Stone, Fora Americana: Speech in Public Places 1974 Sup. Ct. Rev. 233 — 12,16

L. Tribe, American Constitutional Law (1978) — 5,15

BRIEF AMICUS CURIAE.

SUMMARY OF ARGUMENT

The expression in which respondents wish to engage constitutes speech in a public forum. Content restrictions on expression in a public forum are anathema and have been implicitly rejected in the area of religious expression by many of this Court's precedents. Moreover, permitting religious expression in a public forum does not threaten the federal establishment clause, and state prohibitions of establishment cannot justify abridgment of an affirmative federal right.

ARGUMENT

I.

INTRODUCTION

The issue in this case is whether a religious student organization, Cornerstone, and its members may use generally available facilities at a public university for their meetings and other activities. While these respondents may be expected to argue highly cogent free exercise and freedom of expression claims amicus believes that the broader doctrine of free expression in public fora controls the case. The public forum doctrine[1] requires that all religious expression, not

---

1/ While the concept of the "public forum came of age", Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 251, with this Court's decision in Grayned v. City of Rockford, 408 U.S. 104 (1972), it has been amplified and illustratively applied by the lower courts largely without further assistance. Consequently, amicus relies heavily herein on the now well-developed law of the public forum found in the caselaw of these courts, which is worthy of this Court's consideration.

merely that of the respondents, must be permitted to the same extent and degree as other varieties of expression, all of which are entirely appropriate on publicly owned property, particularly on a college campus such as the University of Missouri-Kansas City [the university], which is necessarily devoted to the exchange of ideas. See Healy v. James, 405 U.S. 169, 180-81 (1972)(college environs are peculiarly a marketplace of ideas).

Amicus contends that no establishment results from the exercise of religious expression in a public forum. Many, if not most, of the classic public forum decisions implicitly hold as much since they involved religious proselytization and expression. See, e.g., Kunz v. New York, 340 U.S. 290 (1951) (religious meeting held by Baptist minister); Lovell v. City of Griffin, 303 U.S. 444 (1938) (distribution of religious pamphlets and tracts). The time has now come, therefore, for this court to make explicit what was implicit in these decisions, that religionists enjoy

the same right of expression in public fora as do all other citizens. See McDaniel v. Paty, 435 U.S. 618, 640-42 (Brennan and Marshall, JJ., concurring).[1a]

1a/ The tenuous distinction offered by the university between religious speech and religious services, see Brief of Petitioners at 48-49, can be dismissed out of hand. Not only is the distinction conjured up from whole cloth, but if accepted would require for its enforcement a system of censorship of the type that this Court has long condemned. See Freeman v. Maryland, 380 U.S. 51 (1965); Cantwell v. Connecticut, 310 U.S. 296 (1940). Hence, no distinction among varieties of religious expression are necessary.

II.

RECOGNIZED PRINCIPLES OF FREEDOM OF EXPRESSION REQUIRE THAT RELIGIOUS EXPRESSION BE PERMITTED IN A PUBLIC FORUM ON THE SAME BASIS AS ALL OTHER EXPRESSION.

The government may not discriminate against religious expression [2] in a public forum [3] any more than it may discriminate against any other form of expression, see, e.g., Police Department v. Mosely, 408 U.S.

2/ "[R]eligious speech like other speech, is protected by the First Amendment." Chess v. Widmar, 635 F.2d 1310, 1315 (8th Cir. 1980) (footnote omitted), cert. granted, 101 S. Ct. 1345 (U.S. 1981).

3/ The term "public forum" was coined by Professor Kalven in his seminal article on speech in public places.

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made is an index of freedom.

(footnote cont.)

92 (1972); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)(Frankfurter, J., concurring), or than it may discriminate among varieties of religious expression, Fowler v. Rhode Island, supra at 67. See generally Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975). This Court has recognized as much by upholding the right to religious expression on various types of public property with never a thought of establishment.

For instance, a prohibition of preaching by any denomination in a federally owned village for defense workers could not prevent literature distribution by a minister of the

---

3/ (continued)

Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 11-12. Professor Kalven's article aided the "safe delivery" of this first amendment doctrine which is now "a fully viable creation". L. Tribe, American Constitutional Law §12-21, at 688-89 (1978).

Jehovah's Witnesses for the simple reason that to do so would infringe upon the freedoms of press and religion. Tucker v. Texas, 326 U.S. 517, 520 (1946). A selective prohibition of religious expression fared no better. Saia v. New York, 334 U.S. 558 (1948), overturned the conviction of a Jehovah's Witness for giving amplified lectures on religious subjects without a permit because the delegation of uncontrolled discretion by the permit ordinance allowed it to be used as "a device for the suppression of free communication of ideas", id. at 562, in spite of a pointed reference to the establishment clause by a lone dissenter, id. at 569-70 (Jackson, J., dissenting).

Similarly, Niemotko v. Maryland, 340 U.S. 268 (1951), invalidated a conviction of a Jehovah's Witness for holding a "Bible talk" in a public park without a permit because of the lack of standards controlling the decision to issue or to deny permits with no mention of the establishment clause. The same result

was reached with regard to a Baptist "religious meeting" on the streets. Kunz v. New York, 340 U.S. 290 (1951). 4/ Another Jehovah's Witness case, Poulos v. New Hampshire, 345 U.S. 395 (1953), viewed with approval a New Hampshire Supreme Court decision that a blanket refusal to license religious services in public parks violated freedom of expression principles. Id. at 403-404. Finally, and of particular relevance to

---

4/ Several other cases involving the use of the streets for religious proselytization are also worth noting because the religious nature of the activity was clearly recognized and, in fact, was strongly emphasized as the very reason that this use of the streets could not be proscribed. E.g., Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (activity of Jehovah's Witness colporteurs enjoys the same protection as worship in churches or preaching from pulpits); Jones v. City of Opelika, 316 U.S. 584, 620-23 (1942) (Murphy, J., dissenting), adopted per curiam as majority opinion, 319 U.S. 103 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303-04. Cantwell is especially noteworthy because, while it is the case which held the free exercise clause to be incorporated into the fourteenth amendment, "the court has subsequently understood Cantwell to . . . [have invoked] interests protected by the First Amendment's guarantee of freedom of speech". Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980).

437 F. Supp. 666, 674 (W.D. Pa. 1977)(Greater Pittsburgh International Airport); International Society for Krishna Consciousness v. Engelhardt, 425 F. Supp. 176, 180 (E.D. Mo. 1977)(Kansas City International Airport); see International Society for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979) (Atlanta airports); International Society for Krishna Consciousness v. Lentini, 461 F. Supp. 49 (E.D. La. 1978)(New Orleans International Airport); International Society for Krishna Consciousness v. New York Port Authority, 425 F. Supp. 681 (S.D.N.Y. 1977)(three New York airports).[5/]

5/ These cases are representative of merely those which deal with "unconventional" fora and a concededly religious exercise such as sankirtan. Religious fund raising and literature distribution in the streets and from door to door have generated a host of other decisions which apply first amendment doctrine to activity recognized as religious in nature without distinguishing it from other activity protected by the first amendment. E.g., Love v. Mayor, 448 F. Supp. 128 (D. Wyo. 1978); Levers v. City of Tullahoma, 446 F. Supp. 884 (E.D. Tenn. 1978)(Unification Church); Tate v. Akers, 409 F. Supp. 978 (D. Wyo. 1976), aff'd,

(footnote cont.)

What all of these cases hold implicitly, that the government may not regulate the use of a public forum on the basis of the content of expression, other cases have declared in ringing terms.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfilment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, . . . [376 U.S. 254, 270 (1964)].
>
> Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use

---

5/ (continued)

565 F.2d 1166 (10th Cir. 1977)(Seventh day Adventist church); City of Anchorage v. Berry, 145 F. Supp. 868 (D. Alaska 1956) (Jehovah's Witness).

> to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," [A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)] and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Department v. Mosely, supra at 95-96 (citation and footnote omitted, emphasis added).

Moreover, "Mosely was neither the Court's first nor its last pronouncement that the First and Fourteenth Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression". Carey v. Brown, 100 S. Ct. 2286, 2291 n.7 (1980). "[E]ven a traffic regulation cannot discriminate on the basis of content

unless there are clear reasons for distinctions." Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975).

> [W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, . . . and may even forbid altogether such use of some of its facilities, . . . what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression. . . .

Hudgens v. NLRB, 424 U.S. 507, 520 (1976) (citations omitted, emphasis in the original). 6/

6/ Another case in this line worthy of note is First National Bank v. Bellotti, 435 U.S. 765 (1978), in which this Court included churches among the examples of groups whose expression may not be regulated according to its content, id. at 785.

The university attempts to avoid this principle by arguing that it is not a public forum, that it is different in nature from the streets, parks, transportation facilities, and other public areas that have been held to be public fora. Brief of Petitioners at 44-46. The argument is essentially beside the point because the university has treated its buildings and grounds as suitable for other varieties of expression than religion. The question is not whether the university is a forum for all kinds of expression but rather whether one variety can be excluded.

Be that as it may, there is but one test for determination of a public forum.

> [D]oes the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. The factors to be considered are essentially the same, be the forum selected for expression a street, park, shopping center, bus terminal, or office plaza.

Wolin v. New York Port Authority, 392 F.2d 83, 89 (2d Cir.), cert. denied, 393 U.S. 940 (1968)(bus terminal)(footnote omitted, emphasis added). Accord, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972)(stating same standard for determining existence of public forum).

Nothing in the university's own description of its facilities even suggest that its meeting rooms are not an appropriate place for communication of views, not to mentioned its lawns and sidewalks. While "reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities", Healy v. James, 408 U.S. 162, 192-93 (1972), in order to prevent conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others", Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969), accord, Grayned v.

City of Rockford, supra at 118, are permissible, there would be no excuse for declaring the university off limits for expression.[7/]

The public forum formulation of Wolin and Grayned also refutes the university's contention that its primary purpose, "secular education", Brief of Petitioners at 44, 45 (emphasis in the original), is somehow a distinguishing factor. The critical question is whether a facility can accomodate expression without unduly impeding its primary function, and the university has demonstrated

---

7/ In this respect, and in this respect only, special purpose public facilities differ from the classic public fora, the streets and the parks. For this reason Professor Tribe has dubbed "[p]ublic facilities like schools and libraries, created not primarily for public interchange but for purposes closely linked to expression, . . . as semi-public forums". L. Tribe, supra note 3, at 690. In the semi-public forums the government retains the "power to preserve such tranquility as the facilities' central purpose requires -- a power that would be denied in a true public forum -- but no power to exclude peaceful speech or assembly compatible with that purpose". Id.

that the answer is beyond all doubt in the affirmative by sanctioning other varities of expression. Like the streets, which after all have "primary purposes of passenger and vehicular traffic", Niemotko v. Maryland, supra at 282 (1951)(Frankfurter, J., concurring), the university campus has a constitutionally mandated secondary purpose of serving as a public forum.[8/]

The university has therefore abridged the respondent's affirmative right to freedom of expression guaranteed by the First Amendment. Apparently realizing as much, the

---

8/ The assertion of the university that "cases dealing with areas traditionally received and considered as being open for" expression are somehow therefore distinguishable is hogwash. As Wolin and Grayned demonstrate, the status of a publicly owned place as a public forum stems from its character, not its history. "No longer does the right to effective freedom of expression . . . turn on whether the particular place at issue has historically been dedicated to the exercise of First Amendment rights." Stone, Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 241-52. See also Cass, First Amendment Access to Government Facilities, 65 Va. L. Rev. 1287, 1317-20 (1979). "The important question is not the character of the property, but the character of its use. . . ." Chess v. Widmar, supra at 1318.

university does not really deny that the first amendment is plainly offended. Instead, the university devotes most of its energies to an attempt to demonstrate "that its action is necessitated by governmental interests of the highest order", First National Bank v. Bellotti, supra at 786, compliance with the dictates of the state and federal establishment clauses. For the sake of clarity, therefore, this straw man is separately analyzed in the following section.

III.

SIMPLE RELIGIOUS EXPRESSION UPON STATE PROPERTY DOES NOT CONSTITUTE AN ESTABLISHMENT OF RELIGION.

The long-recognized purpose of the establishment clause of the federal constitution is to mandate governmental neutrality in all involvement with matters of religion.

> Government, in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968)(footnote omitted). Because the clause is thus synonymous with neutrality, it is violated by, but only by, "financial support, and active involvement of the sovereign in

religious activity" which amounts to "sponsorship by the sovereign. . . ." Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

Consequently, the few cases [9/] in which the university's theory that regular use of its facilities for religious purposes would constitute an establishment, has been presented in any guise have soundly rejected it. For

---

9/ Of the numerous cases cited by the university only two of them involve an analogous problem of voluntary religious expression in an arguably public forum. These decisions, Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977), cert. denied, 434 U.S. 877 (1977), and Brandon v. Board of Educ., 487 F. Supp. 1219 (N.D.N.Y.), aff'd, 635 F.2d 971 (2d Cir. 1980), petition for cert. filed, No. 80-1396 (U.S. Feb. 17, 1981), both involved high schools rather than colleges or universities and, whatever their merits, are therefore distinguishable for the reasons stated by the Eighth Circuit.

> This case is also distinguishable from those that involved the requested use of classrooms for prayer or Bible study by high school student groups. . . . First, high school students necessarily require more supervision than do young adults of college age and this supervision necessarily poses a greater risk of entangling governmental authority in

(footnote cont.)

instance, a ban on the conduct of a Catholic Mass in the commons room of a university dormitory was rejected both by the Delaware Chancellor and by the Delaware Supreme Court.

> [W]e hold that the University cannot support its absolute ban on all religious worship on the theory that, without such a ban, University policy allowing all student groups, including religious groups, free access to dormitory common areas would necessarily violate the Establishment Clause. The Establishment cases decided by the United States Supreme Court indicate that neutrality is the safe harbor in

---

9/ (continued)

> religious issues. Teachers ordinarily assigned to assist and supervise high school student groups may be thrust into an untenable position when assigned to supervise a prayer group. Even their presence in the room may suggest governmental approval of the religious activities of the group. There is no evidence in the record before us, however, that Cornerstone or any other student group at UMKC receives supervision or assistance from any member of the University's faculty.

Chess v. Widmar, 635 F.2d 1310, 1319-20 (8th Cir. 1980), cert. granted, 101 S. Ct. 1345 (U.S. 1981). Accord, Brandon v. Board of Educ. supra, 635 F.2d at 980.

> which to avoid First Amendment violations: neutral "accomodation" of religion is permitted, Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947); Zorach v. Clauson, . . . while "promotion" and "advancement" of religion are not. McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948); Abington School District v. Schempp, . . . University policy without the worship ban could be neutral towards religion and could have the primary effect of advancing education by allowing students to meet together in the commons room of their dormitory to exchange ideas and share mutual interests. If any religious group or religion is accommodated or benefited thereby, such accomodation or benefit is purely incidental, and would not, in our judgment violate the Establishment Clause. Tilton v. Richardson, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971). The commons room is already provided for the benefit of the students. It is not a dedication of the space to promote religious interests. Therefore, in regard to the Establishment Clause, we agree with the view taken by the Court of Chancery.

Keegan v. University of Delaware, 349 A.2d 14, 15 (Del.), rev'g on other grounds, 318 A.2d 135 (Del. Ch. 1974), cert. denied, 424 U.S. 934 (1975).

Similarly, Pratt v. Arizona Board of Regents, 110 Ariz. 466, 520 P.2d 514 (1974), held that a lease of public stadium facilities to evangelist Billy Graham for religious services did not violate the establishment clause of the Arizona Constitution which provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment". The Arizona Supreme Court held that

> The lease . . . does not place the power, prestige, or approval of the State of Arizona State University behind the religious beliefs of the lessee, nor connote favor by the State for Reverend Graham over any other religious group with the money to lease the stadium.

Id. at 469, 520 P.2d at 517.

Likewise, the late Judge Wollenberg rejected out of hand a similar argument with the basic purpose of the establishment clause.

> The Court feels that the defendant has misread the cases in which the Supreme Court has explored and delineated the scope of the

establishment clause. Those cases recognize that the division between church and state cannot be complete: "It is equally well established, however, that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973). Rather, the Court has determined that a law challenged on establishment grounds must be analyzed in light of whether it furthers the central problems against which the Clause protects; primary among those problems include the sponsorship, financial support, and active involvement of the sovereign in religious activity." 413 U.S. at 772, citing Walz v. Tax Commission, 403 U.S. 664, 668 (1970); Lemon v. Kurtzman, 403 U.S. at 612. The establishment clause seeks to insure governmental neutrality "between religion and religion, and between religion and nonreligion." Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

A policy allowing all speakers access to [California] D[epartment of]M[otor] V[ehicles] grounds, subject to reasonable regulation, would maintain the proper neutrality with respect to religion. The policy would clearly have the useful secular purpose and effect of encouraging the expression of ideas on all subjects of interest.

> Implementation of such a policy would not involve government sponsorship, financial support, or active involvement in religious activity, the problems emphasized in most establishment cases. In that the policy would benefit all speakers, as well as the public, the benefit of one particular group must be considered to be incidental.

Jaffe v. Alexis, No. C-79-1229 ACW, slip op. at 6-7 (N.D. Cal. Aug. 13, 1979)(Order Granting Injunctive Relief), appeal filed, No. 80-4022 (9th Cir. Jan. 11, 1980).

The District of Columbia Court of Appeals has also rejected the religious-speech-as-establishment theory. O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979). A close parsing of that decision is appropriate because it demonstrates the operation of the principles governing speech in the public forum, which control this case as well.

O'Hair, which rejected an establishment clause challenge to a permit for the Pope to celebrate Mass on the National Mall in Washington, D.C., rests upon two central holdings. First, in the absence of a prefer-

ence for religious expression over other varieties, there is no establishment.

> When the National Mall is, by a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to all others (religionists and anti-religionists), there is no "establishment of a religion," and there cannot be a meaningful perception of one.

Id. at 934 (footnote omitted, emphasis in the original).

Second, the de minimus aid that a church or religious exercise may receive from non-discriminatory access to a public forum constitutes mere accommodation, [10/] not establishment.

10/ Accommodation of religion may go far indeed if religion is not singled out for special favoritism and is merely one of several activities accommodated and if religion is not subsidized. See Walz v. Tax Comm'n, supra at 672-74. For example, long term leases of land for use as chapels at publicly-owned John F. Kennedy Airport do not constitute an establishment. Brashich v. Port Auth., 484 F. Supp. 697, 703-04 (S.D.N.Y. 1979), aff'd, 628 F.2d 1344 (2d Cir. 1980)(table).

> Theoretically, any government aid indirectly frees religious resources to be put to sacred ends. The Court has recognized however, that prohibiting all assistance would mean that "a church could not be protected by the police and fire departments, or have its public sidewalks kept in repair." Roemer v. Board of Public Works, 426 U.S. 736, 747, 96 S. Ct. 2337, 2345, 59 L. Ed. 2d 179 (1976). That, of course, is not the law.

Id. at 935.

Consequently, there is simply no constitutional objection to religious speech in the public forum.[11/] "This principle that

---

11/ Although the university attempts to find solace in the concurring opinion in O'Hair, Brief of Petitioners at 48, there is none to be found. The concurring opinion merely notes that regular use of the National Mall by any group is prohibited by the park regulations and that therefore no problems of equation of the park with a church, the shrill cry of the plaintiff, was even possible. O'Hair v. Andrus, supra at 938 (MacKinnon, J., concurring); cf. Saia v. New York, 374 U.S. 558 (1948)(series of religious lectures in public park; claim of dissent that establishment would result was ignored). The concurring opinion then goes on to directly refute the contention of the university that religious expression on public property demonstrates approval of its content. O'Hair v. Andrus, supra at 938.

some use of public property for a religious service may occur without constituting an "establishment" of religion is not confined to emergencies. . . . The legitimacy of non-discriminatory, voluntary religious exercises in parks is plain. . . ." Id. at 937. 12/

Even in the context of the use of public school buildings, 13/ the impropriety of state promotion of the message to be expressed has been specifically rejected as a reason for discriminatory regulation of the use of a public forum. For example, under

---

12/ "Judge Leventhal's scholarly opinion in O'Hair" was relied upon by the Eighth Circuit to illuminate "[t]he fine line between impermissible governmental aid to religion and the neutral accommodation of religious groups' First Amendment rights. . . ." Chess v. Widmar, supra at 1318.

13/ The fear that the public schools may be used as vehicles for the advancement of religion is both deep and widespread and has generated both constitutional restrictions, see, e.g., Cal. Const. art. IV, §8 (prohibition of direct or indirect sectarian or denominational instruction or teaching), and a substantial body of caselaw, see e.g., Engel v. Vitale, 370 U.S. 421 (1962) (New York Regents'

(footnote cont.)

pressure from the Department of Health, Education and Welfare, a local school board rescinded an earlier policy which allowed its facilities to be used outside school hours by all comers and instead adopted a policy which excluded from them groups which advocate racial discrimination including, of course, the Ku Klux Klan. On appeal, the Fifth Circuit first quickly rejected an argument that allowing KKK use would impede desegregation and then turned to an argument that, by allowing use of its facilities, the school board would somehow "involve" itself with the views of the KKK.

> A more logical concern is that the state, in the person of the Board, might be seen as acting to forward KKK's views and policies by permiting any use of its facilities

---

13/ (continued)

prayer led by public school teachers declared unconstitutional).

> by such an organization. It is certainly true that significant state action in support of such things is prohibited. . . . But the weight of authority seems to be that merely permitting the occasional and temporary use of state facilities by racially discriminatory groups along with all others does not constitute significant state involvement in their practices.

Knights of the Ku Klux Klan v. East Baton Rouge, Parish School Board, 578 F.2d 1122, 1127-28, (5th Cir. 1978)(emphasis in the

original). [14/] Accord, National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973)(analogizing the use of a public forum by organization advocating racial discrimination to providing police and fire protection for churches); Danskin v. San Diego Unified School District, 28 Cal. 2d 536, ___, 171 P.2d 885, 892 (1946) ("Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting.").

The argument of the university to the contrary is based upon a simplistic application of the three-part test for the presence

---

14/ The observation of the court that state action in support of the views of the KKK is "certainly" prohibited rebuts any argument that there are restrictions upon government in its relationship with the exercise of religion which are not imposed upon it in its relationship with other types of speech. Neutrality of the government in the regulation of a public forum, see, e.g., Police Dept. v. Mosely, 408 U.S. 92 (1972), is as essential as it is in the regulation of religious activity, see, e.g., Epperson v. Arkansas, supra.

of an establishment of religion enunciated by Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I), and its progeny. On analysis, no prong of the test is violated; indeed, no one of them is even casually touched.

First, as the Eighth Circuit observed, a policy that permitted equal use by the plaintiffs as well as others of the university property as a public forum would "reflect a clear secular purpose" of encouraging the expression of ideas on all subjects of interest". Chess v. Widmar, 480 F. Supp. 907, 919 (W.D. Mo. 1979), quoted with approval, id., supra at 1315. Whether the prohibition that the university seeks to impose is defined in terms of all religious expression or in terms of only religious worship, the fact that the use of the forum by religious groups would not be exclusive but would be in common with political and cultural groups seeking to spread their message to the

university community cannot be gainsaid.

Second, the effect of non-discriminatory policy for use of the university facilities would neither advance nor inhibit either religion or non-religion. The university argument to the contrary relies upon reliance upon the actual indirect and remote financial aid which even the sporadic use of public property entails and the appearance of sponsorship and endorsement. But neither of these thin reeds withstands analysis.

In a world in which the environmental axiom that everything affects everything else is now widely recognized, an "effect test is inescapably one of degree". Walz v. Tax Commission, 397 U.S. 664, 674 (1970)(entanglement branch of three-prong test). "The crucial question is not whether some benefit accrues to a religious institution . . . , but whether its principal or primary effect advances religion." Tilton v. Richardson, 403 U.S. 672, 679 (1971)(emphasis added)

(holding financial assistance to church-related colleges and universities constitutional).

Policies which primarily serve a secular end such as public safety, secular education, and the encouragement of public service activities have therefore been found to be constitutional even though they incidently resulted in tangible benefit to religions in the form of bus transportation, textbooks, and tax exemptions. All of these incidental benefits gave aid to religion because

> all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968); Walz v. Tax Comm'n, supra.

Id.

Here, the assistance to any religion which chooses to temporarily appropriate

university property for use as a public forum is de minimus at best. The "subsidy" that such groups would receive is no greater than that received by the Catholic Church when it used the National Mall for a Mass by the Pope, O'Hair v. Andrus, supra, or by the Jehovah's Witnesses who used a small park in a small city, "public tax-supported property", Saia v. New York, supra at 569 (1948)(Jackson, J., dissenting), in order to spread their faith. Indeed, the subsidy provided by use of the university sidewalks and buildings for religious purposes is qualitatively no different from and quantitatively no greater than that provided by the use of the sidewalks and streets of a city for that purpose, see, e.g., Kunz v. New York, 340 U.S. 290, 293 (1951) (Baptist "religious meeting" on public streets). Such "minimal" financial support does not an establishment make. See Chess v. Widmar, 635 F.2d at 1317.

In fact, no subsidy in a legal sense exists in either any of the cited cases or in this one. Instead, by providing public property which may be commandeered for use by members of the public, including those with messages on the subject of religion, the government provides a "general government service" analogous to police and fire protection, sewers, and highways, which have never been so much as suspected of presenting establishment problems even though they are provided to churches. Everson v. Board of Education, 330 U.S. 1, 17-18 (1947). The reason is, simply enough, that to exclude churches or religious believers or both from generally available benefits and services would penalize religious belief and transform the government from a neutral by-stander vis-a-vis religion to its adversary and would thus violate the first amendment. See id. at 18, Chess v. Widmar, 635 F.2d at 1317 (singling out religious speech for prohibition discredits and inhibits it and therefore

violates establishment clause).

Apparently conscious of the matchstick strength of this portion of its effect argument, the university also argues that an appearance on sponsorship would result from the presence of religious expression on its campus. But other than pointing to the natural desire of Cornerstone not to be stigmatized as a pariah, the university is unable to point to any evidence or authority that its imprimatur would be placed on the respondents. That equation is one that the Saudi Arabian government might make between American public television and a program offensive to the Saudis that the network finds worthy of broadcasting, but it is not one which someone more familiar with the expressive tumult of a free society is likely to make.

> Properly analyzed, there is simply no state involvement here in . . . ideas or practices, whatever they may be, and no state action endorsing them. For here, the decisive action of the state was an indifferent

> one, analogous to dedicating a public park: it threw open the doors . . . for . . . use by all comers, on a first-come, first-serve basis. Thereafter, its only additional function was the housekeeping one of scheduling -- determining who came first to apply for a particular time. . . . Thus, the state is here no more involved in or responsible for the views expressed or for the composition of the groups which expressed them in the forum which it created than the United States is in who makes speeches or holds demonstrations on the Mall.

Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, supra at 1128 (emphasis in the original, citation omitted); see Chess v. Widmar, 635 F.2d at 1317 (speaker sponsors ideas, not the forum itself).

Even more closely in point is the short shrift that the contention of the university was given in O'Hair.

> Appellants say that the government permit for this occurrence on the renowned National Mall sends an implied message -- to the nation and to the world -- of government approval (and therefore "establishment") of this church service. It implies no more approval for this church

> than for any other group using the Mall. The message that it does send the world is approval of the principles of freedom of demonstration, for all groups, for all religions, even for those opposing religion.

O'Hair v. Andrus, supra at 936.

But even were there a factual predicate for the identification argument, it would avail the university nought since a less restrictive alternative to the total proscription of religious expression exists that would obviate the perceived problem. Because of the vital interest of society as a whole in free and open communication of ideas, if any means of achieving a state purpose less restrictive of the avenues of communication exists than the one in question, that alternative must be adopted, no matter how important the state interest may be. The government must prove that nothing less than the restriction it seeks to defend would serve a compelling state interest. Wright v. Chief of Transit Police, 558 F.2d 67, 68 n.1 (2d 1977).

> Since there is a presumption against restraints on first amendment freedoms, the specific means of regulating or limiting those freedoms must be the least restrictive ones possible and needed to accomplish the compelling public purpose. It is not constitutionally adequate or acceptable to show that the particular means selected are one rational way of achieving the government purpose. The burden is on the government to demonstrate that the chosen means are the minimum restrictive ones necessary.

United States v. Silberman, 464 F. Supp. 866, 873 (M.D. Fla. 1979). See Kusper v. Pontikes, 414 U.S. 51, 59 (1973)(if less drastic method available to achieve state end, scheme that boradly stifles individual liberty may not be chosen); A Quaker Action Group v. Morton, 516 F.2d 717, 726 (D.C. Cir. 1975)(restriction must be no greater than essential); Jeannete Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575, 584-85 (D.D.C.)(same), aff'd mem., 409 U.S. 972 (1972).

Moreover, the less restrictive alternative need not be equally as effective as the one which the state seeks to defend.

Scheider v. New Jersey, 308 U.S. 147 (1939), held unconstitutional three ordinances that prohibited distribution of pamphlets and handbills on the public streets that were defended as measures aimed at preventing litter. Despite the notorious fact that prosecution of litterers is a rare event and that the fear of prosecution for littering deters almost no one (as a casual observation of any urban street will confirm), nonetheless this Court held that the solicitude of the first amendment for literature distribution "does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets". Id. at 162.

Similarly, Cantwell v. Connecticut, 310 U.S. 296 (1940), held that a licensing scheme that "merely safeguards against the perpetration of frauds under the cloak of religion", id. at 304, is offensive to the first amendment because the hit-or-miss alternative of

criminal prosecution could achieve this goal. "Certainly penal laws are available to punish such conduct." Id. at 306. Accord, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

As the court concluded in Schneider, even though the less restrictive means may be "less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated . . . , and who may import the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press". Schneider v. New Jersey, supra at 164. Accord, Village of Schaumburg v. Citizens for a Better Environment, supra at 639.

The less drastic means in this case is both simple and obvious. If the university fears that the appearance of sponsorship will result from the presence of religious expression on its property, "prominently placed disavowals could be posted that would entail

a less onerous means of dealing with the problem than banning all such speech". Jaffe v. Alexis, supra at 7.

As this Court recently observed, the university could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers [or worshippers] stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of . . . law". Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035, 2044 (1980).[15/]

In sum, religious expression cannot be

15/ The university also advances an entanglement argument which, other than restating its subsidy argument in another form, consists of an assertion that competition for use of its facilities with other groups would create divisiveness. Suffice it to note that that problem could easily be solved with a neutral allocation system, such as first-come, first-served, and in that it is in no way different from the same problem of policing the use of a forum that exists in areas in which even the university concedes that religious expression is permissible. In essence, all that the university can muster in support of its divisiveness argument is "undifferentiated

(footnote cont.)

prohibited from a public forum absent a compelling state interest. Avoiding an establishment cannot possibly qualify as such an interest since no portion of the three-part establishment test is violated by the absence of such a prohibition.

15/ (continued)

fear and apprehension". Tinker v. Des Moines, Independent Community School Board.

IV.

COMPLIANCE WITH STATE CONSTITUTIONAL MANDATES CANNOT JUSTIFY CONTRAVENTION OF THE FEDERAL FIRST AMENDMENT.

The university appears to have the temerity to suggest that compliance with Missouri constitutional provisions, Mo. Const. art. I, §§6-7; id. art. IX, §8, somehow excuses its trampling on plaintiffs' federal first amendment rights. Brief of Petitioners at 36-42. This argument cannot be taken seriously in light of the supremacy clause, U.S. Const. art. VI, cl. 2.

No matter what the state constitution may say, even were it to declare in so many words that "no one shall ever so much as breathe the name of God on state property", the first amendment would still be the law of the land, "anything in the constitution

or laws of . . . [the] state notwithstanding". Id. (capitalization modernized, emphasis added). For this reason this Court has held unconstitutional a state constitutional provision that disqualified ministers from serving as legislators because it abridged their federally guaranteed rights to free exercise of religion, McDaniel v. Paty, 98 S. Ct. 1322 (1978), a state constitutional provision which required an oath of theistic belief as a requirement to hold public office because it abridged freedom of belief and religion, Torcaso v. Watkins, 367 U.S. 488 (1961), and a state constitutional provision forbidding fair housing laws because it denied equal protection of the laws in contravention of the fourteenth amendment, Reitman v. Mulkey, 387 U.S. 369 (1967), aff'g 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1967). If the Missouri constitution does indeed forbid simple religious expression on public property, it deserves the same fate.

Because the Missouri Constitution cannot constitute a compelling state interest[16/] that would justify restricting religious expression, access to the university facilities

---

16/ The university's concern for establishment is understandable given the genesis of the Missouri constitutional provisions it seeks to vindicate but is sadly misplaced. Both the Missouri Constitution relied upon in this case, Mo. Const. art. I, §§6-7, id. art. IX, §8, and the Washington Constitution, art. I, §11 and art. IX, §4, which was relied upon in a similar action, Dittman v. Western Washington University, No. C 79-1189 V (W.D. Wash. Feb. 27, 1980), appeal docketed, No. 80-3120 (9th Cir.), specifically prohibit state monetary aid for any church or religion. Both constitutions date from the latter half of the Nineteenth Century, an era in which public schools were dominated by a "pan-Protestant" ideology, see L. Pfeffer, God, Caesar and the Constitution 170-73 (1975). Because of the bias of the public schools, the Catholic parochial school system flourished, id. at 230, while proposals to provide it with public funding on an equal footing with the Protestant dominated public schools were defeated. At the same time stringent prohibitions of financial aid to parochial schools were adopted. Id. at 259. These provisions became known as "Blaine Amendments" after a defeated federal constitutional amendment to the same effect offered by Senator Blaine, H.R. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 5190 (1876).

By themselves these constitutional provisions are beyond reproach and do not deny

(footnote cont.)

for Cornerstone and its members is simply a prime example of that "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference". Walz v. Tax Commission, supra at 669. Permitting, even encouraging, the religious activities envisaged by plaintiffs therefore "follows the best of our traditions". Zorach v. Clauson, 343 U.S. 306, 314 (1952)(Douglas, J.).

16/ (continued)

equal protection of the laws merely because they deny a benefit to religious school students granted to their public brethern. Brusca v. Missouri ex rel. State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971), aff'd, 405 U.S. 1050 (1972). But where the federal constitution creates an affirmative right such as free exercise of religion, the state constitution would necessarily have to be qualified, see Weiss v. Bruno, 82 Wash. 2d 199, 206 n. 2, 509 P.2d at ___, n.2 since "of course the supremacy clause of the federal constitution not even a state constitutional prohibition can overcome such an expression of a federal constitutional right". [1977] Wash. Op. Att'y Gen. No. 11, at 15 (footnote omitted, emphasis in the original). Thus, the vice of the state positions in these cases is that they rely upon a state created establishment perspective and analysis at the expense of federal constitutional rights.

V.

CONCLUSION

Not long ago two justices of this Court summarized the constitutional principles which directly contradict the argument that religious speech on public property constitutes an establishment.

> Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations and that each sect is entitled to "flourish according to the zeal of its adherents and the appeal of its dogma." Zorach v. Clausen, 343 U.S. 306, 313 (1952). Accordingly, religious ideas, no less than any other, may be the subject of debate which is "uninhibited, robust, and wide-open", New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Government may not interfere with efforts to proselytize or worship in public places. It may not tax the dissemination of religious ideas. It may not seek to shield its citizens from those who would solicit them with their religious beliefs.
>
> . . .
>
> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religius divisiveness and strife does not rob it of constitutional

> protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).
>
> . . .
>
> In short, . . . [r]eligionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood is a shield against any attempt by government to inhibit religion as it has done here. . . . It may not be used as a sword to justify repression of religion or its adherents from any aspects of public life.

McDaniel v. Paty, 435 U.S. 618, 640-42 (1978) (Brennan and Marshall, JJ., concurring)(footnotes and some citations omitted, emphasis added).

For the reason stated by Justices Brennan and Marshall as well as for the reasons discussed herein, religious expression on public property without a good deal more does not constitute an establishment. Accordingly, the judgment of the Eighth Circuit should be affirmed.

Dated: 29 May 1981

Respectfully submitted,

Barry A. Fisher, Counsel of Record
Larry J. Roberts
David Grosz
Fisher & Moest
Two Century Plaza, Suite 3160
2049 Century Park East
Los Angeles, California 90067
(213) 557-1077

Attorneys for Holy Spirit
Association for the Unification
of World Christianity, Amicus Curiae